



Board of Directors:

Mel Sheldon - Chairman
Deborah Parker, Cicala - Vice Chairman
Marie Zackuse, Secretary
Chuck James - Treasurer
Glen Gobin, Ti Ceta, Board Member
Marlin Fryberg Jr., Sxwilus Board Member
Theresa Sheldon, Board Member
Sheryl Fryberg, Swia?ted, General Manager

6406 Marine Dr.
Tulalip, WA 98271-9694
(360) 716-4000
FAX (360) 716-0628

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, and Skykomish tribes and other tribes and band signatory to the Treaty of Point Elliott

September 20, 2013

Kevin K. Washburn
Assistant Secretary – Indian Affairs
United States Department of the Interior
MS-4141-MIB
1849 C Street NW
Washington, DC 20240
consultation@bia.gov

RE: 1076-AF18 Proposed Revisions to Regulations on Federal Acknowledgment of Indian Tribes (25 CFR Part 83)

The Tulalip Tribes provides these comments in response to the Bureau of Indian Affairs' *Preliminary Discussion Draft*, proposing changes to the federal regulations entitled *Procedures for Establishing that an American Indian Group Exists as an Indian Tribe*, 25 CFR Part 83.

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie, Skykomish, and associated dependent bands signatory to the 1855 Treaty of Point Elliott. This treaty helped to ensure that the Tulalip people will continue to exercise the inherent sovereign rights that they have possessed since time immemorial. Furthermore, the Point Elliott Treaty is indicative of the historical government-to-government relationship that the Tulalip Tribes maintains with the United States government, as do other recognized American Indian tribes.

The Tulalip Tribes writes to express concern over the Bureau's apparent departure from longstanding precedent, and strongly urges the Bureau not to weaken the substantive criteria for federal acknowledgment. Native American heritage alone does not confer the sovereign rights of a tribal government. Substantive standards should continue to place the burden on petitioning groups to prove their entitlement to a government-to-government relationship with the United States based on historic and continuing exercises of tribal sovereignty. Furthermore, the Bureau should not construe a petitioning group's evidence in a liberal manner – the Bureau should weigh evidence responsibly and impartially.

Modest changes to 25 CFR Part 83 may help to clarify existing substantive standards for acknowledgment. However, any changes to the federal acknowledgment regulations should not undercut the federal trust responsibility to existing Indian tribes by weakening the substantive standard to achieve federal acknowledgment, and including groups who undoubtedly have not shown a history of tribal existence and self-governance. Furthermore, the revised regulations should not

allow another opportunity for groups to petition who have previously been denied acknowledgment after full and fair consideration.

I. REMOVAL OF HISTORIC EXISTENCE CRITERION INVITES RACIAL DISCRIMINATION CHALLENGES

American Indian tribes are sovereign nations with inherent rights to self-governance that preexist the establishment of the United States government. These inherent sovereign rights give rise to a unique government-to-government relationship rooted in the historic and legal relationship between the United States and sovereign tribal governments.

Sovereignty is an inherent right of tribal governments, *not* American Indian people as a racial group. Failure to maintain this distinction may invite legal challenges to American Indian interests and programs on the grounds that they are racially discriminatory. The Bureau should be greatly concerned about such legal challenges at a time when the federal courts remain hostile to American Indian interests.

For these reasons, the Tulalip Tribes is troubled that the Bureau proposes to abandon the federal acknowledgment criterion requiring demonstration of continuous existence as a tribal entity since historic times, thereby allowing discrete racial groups of Indian people to achieve recognition upon a showing of existence only since 1934. This departure from previous standards reverses decades of administrative and judicial precedent stressing the importance of historical context in federal-tribal relations. Such a reversal in position endangers the rights of federally recognized American Indian tribes and undercuts the federal trust responsibility.

II. DEPARTMENT SHOULD NOT HAVE THE BURDEN OF DISPROVING ACKNOWLEDGMENT CRITERIA

The Tulalip Tribes is also troubled that the Bureau proposes to greatly reduce the burden of proof to achieve federal acknowledgment. A petitioning group should have the burden of proving that it meets all mandatory criteria for acknowledgment. Furthermore, the Bureau should not construe a petitioning group's evidence in a liberal manner – the Bureau should weigh evidence responsibly and impartially.

Proposed § 83.6(d)(1)(i) would require the Bureau to construe all evidence in the light most favorable to the petitioners. This provision would seemingly preclude the Bureau from fairly weighing the evidence presented, and would effectively require the Bureau to *disprove* any of the facts alleged by a petitioner as long as there is any evidentiary basis, no matter how slight, for a petitioner's contention. Furthermore, this evidentiary standard would prejudice any interested parties who may wish to submit evidence relative to an acknowledgment request by requiring the Bureau to construe such evidence favorably to the petitioning group.

By reducing the burden of proof, the Bureau would also invite renewed efforts to achieve acknowledgment from groups who have previously been denied federal acknowledgment. The Tulalip Tribes urges the Bureau to continue to require a petitioning group to support its petition

with credible evidence, and to allow the Bureau to fully and fairly weigh the evidence presented by a petitioning group or any other interested party.

III. CHANGES TO 25 CFR PART 83 SHOULD IMPROVE PROCEDURES, NOT REDUCE SUBSTANTIVE REQUIREMENTS

Instead of diluting substantive requirements to prove the continuous existence of a sovereign tribal government, the Bureau should improve procedures for submission and consideration of federal acknowledgment requests. The Tulalip Tribes joins the Muckleshoot Tribe's comments suggesting that the Bureau should require petitioning groups to present an organized factual record in support of their petitions, and cite with specificity the evidence supporting each of their contentions. Furthermore, the Bureau could create an internet-based system for filing and posting materials related to an acknowledgment petition, thereby reducing administrative burdens on Bureau staff.

IV. CONCLUSION

The Bureau proposes sweeping changes to the federal acknowledgment criteria without true government-to-government consultation with existing tribes, even though the Bureau has a clear responsibility to engage in such consultation. Proposed changes to the substantive criteria for federal acknowledgment endanger the federal trust responsibility to recognized Indian tribes and reverse decades of settled precedent. Instead of diluting the substantive criteria, reforms to the federal acknowledgment process should focus on streamlining procedural requirements and reducing the burden on Bureau staff.

Pursuant to Executive Order 13175 of November 6, 2000, executive departments and agencies must engage in regular and meaningful consultation and collaboration with tribal officials in the development of federal policies that have tribal implications, and must strengthen the government-to-government relationship between the United States and American Indian tribes. Consultation requires meaningful input from tribes and representation from tribal governments as the rules are developed. At the present time, the Bureau's "Preliminary Discussion Draft" proposes numerous and significant changes to the acknowledgment process without adequate justification or input. Therefore, the Tulalip Tribes urges the Bureau to engage in true government-to-government consultation before proceeding with any final revisions.

Attached hereto is a chart specifying the Tribes' remarks in response to the Bureau's "Preliminary Discussion Draft" of revisions to 25 CFR Part 83.

Sincerely,



Melvin R. Sheldon, Jr., Chairman, Tulalip Tribes of Washington

Cc: Tulalip Board of Directors, Tulalip General Manager.

REMARKS IN RESPONSE TO “PRELIMINARY DISCUSSION DRAFT”

<u>SECTION</u>	<u>REMARKS</u>
§ 83.1	<ul style="list-style-type: none"> • Definition of “continuously” or “continuous” should require demonstration of historic existence, not existence only since 1934. • Definition of “documented petition” should specify organizational requirements for submission of a documented factual record corresponding to the petitioning group’s arguments in support of each acknowledgment criterion.
§ 83.3	<ul style="list-style-type: none"> • § 83.3(a) language should remain that Part 83 “is intended to apply to groups that can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.” • § 83.3(d) should continue to require that a group must who existence “throughout history,” not since 1934. • § 83.3(f) should specify that revisions of Part 83 do not allow <i>any</i> groups who have previously been denied federal acknowledgment to seek acknowledgment.
§ 83.5	<ul style="list-style-type: none"> • § 83.5(b) should provide for the promulgation of binding standards for the preparation and formatting of documented petitions, and for the interpretation of federal acknowledgment criteria.
§ 83.6	<ul style="list-style-type: none"> • § 83.6(b) and (c) bifurcate petitions that are subject to an “expedited favorable finding” and those that must meet all acknowledgment criteria. This is confusing and inequitable. All petitioning groups should be required to demonstrate that they meet all criteria. • § 83.6(d)(1) appears to be internally contradictory, requiring both a “preponderance of the evidence” and “a reasonable likelihood” standard, yet also providing that evidence is to be construed in the light most favorable to the petitioner. The standard of proof is ambiguous, and would seem to allow arbitrary and capricious evaluation of the evidence. Petitioners should have the burden of proving that they meet the mandatory criteria, and the Bureau should be able to appropriately evaluate and weigh any evidence presented relative to an acknowledgment request. • § 83.6(f) should continue to require continuity through history, not since 1934.
§ 83.7	<ul style="list-style-type: none"> • § 83.7(a) should continue to be a mandatory criterion. • § 83.7(b) should continue to require continuity throughout history, not since 1934. Present language requiring that a “predominant portion” of a petitioning group must comprise a distinct community appears to require a simple majority. The Tulalip Tribes opposes any proposal to weaken the distinct community criterion by reducing the percentage of the petitioning group that is considered. • § 83.7(b)(2) provides various measures by which the distinct community criterion may be met by 50% of a petitioning group. The Tulalip Tribes opposes any proposal to reduce the percentage of a petitioning group that

	<p>must demonstrate that it exists as a distinct community.</p> <ul style="list-style-type: none"> • § 83.7(b)(3) should not primarily consider the period from 1934 to the present. A petitioning group should be required to demonstrate the historic and present existence of a distinct community. • § 83.7(c) should continue to require demonstration of political influence historically and presently, not since 1934. Furthermore, the mere existence of ostensible tribal leaders should <i>not</i> be considered sufficient to demonstrate actual political influence. • Evidence of Native American descent alone is not proof of political influence or the existence of tribal sovereignty. • § 83.7(c)(4) should not primarily consider the period from 1934 to the present. A petitioning group should be required to demonstrate political influence throughout history and at the present time. • § 83.7(e) should continue to require <i>all</i> members of a petitioning group to be descended from a historical Indian tribe. • § 83.7(e)(1)(v), allowing for the submission of historians' and anthropologists' conclusions as evidence of tribal descent, is poorly defined and subjective. Furthermore, the language at § 83.6(d)(1) would require a historian's or anthropologist's subjective conclusions to be construed favorably toward a petitioning group in all cases, rather than weighed against other evidence or conclusions of other qualified professionals. • The Bureau should responsibly and impartially weigh any evidence submitted in support of a petition. • § 83.7(f) should continue to require a petitioning group to demonstrate that it has functioned throughout history as a separate and autonomous Indian tribal entity, not since 1934.
§ 83.8	<ul style="list-style-type: none"> • § 83.8(d) should require a previously acknowledged group to establish that it is the same tribal entity that was previously acknowledged. Furthermore, the previously acknowledged group should nonetheless be required to demonstrate that it can meet <i>all</i> mandatory criteria.
§ 83.10	<ul style="list-style-type: none"> • § 83.10(g)(3) should not allow a petitioning group to circumvent the mandatory acknowledgment criteria. Furthermore, any such "expedited favorable criteria" should not primarily consider the period from 1934 to the present. Rather, demonstration of historic existence should be required in all cases. • § 83.10(n) should allow the Assistant Secretary to issue the final determination on an acknowledgment petition, and to convene any necessary hearings. • § 83.10(r) <i>should not</i> allow any group that has previously been denied federal acknowledgment to present a new petition.
§ 83.12	<ul style="list-style-type: none"> • § 83.12(a) provides that a newly acknowledged tribe shall be considered "a historic tribe." However, the proposed revisions to the substantive criteria would only require existence since 1934. To be considered "a historic tribe," a petitioning group should be required to demonstrate that it has historically existed as a tribe.